Message

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Subject: Daily Clips 07/08/2019

Daily Clips for July 8th, 2019

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The Hill: Trump's not-so-secret war on state environmental protection

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ACE

Greenwire

Health groups launch carbon rule courtroom brawl

https://www.eenews.net/greenwire/2019/07/08/stories/1060712447

Pamela King

A pair of public health groups today fired opening shots in an anticipated legal war over the Trump administration's Clean Power Plan replacement rule.

The petition from the American Lung Association and American Public Health Association comes at the start of a 60-day deadline for challenges over EPA's Affordable Clean Energy rule.

Unlike the Obama-era Clean Power Plan, the ACE rule does not impose emissions limits for power plants and offers a more limited menu of technologies that some experts say could extend the life of polluting coal-fired facilities.

"As affirmed by the U.S. Supreme Court, EPA has legal authority and obligation under the Clean Air Act to protect and preserve public health and welfare, including by regulating carbon dioxide pollution from coal-fired power plants," the groups said in a statement today.

"However, it is simply not lawful for EPA to use its legal authority in ways that will increase dangerous air pollutants and harm the health of Americans."

Attorneys from the Clean Air Task Force filed the petition today in the U.S. Court of Appeals for the District of Columbia Circuit.

In their press release, the American Lung Association and American Public Health Association cited recent findings endorsed by 74 health and medical organizations that called climate change the "greatest public health challenge of the 21st century."

"In addition to increasing the carbon dioxide pollution that fuels climate change, independent research from 2019 predicts that the ACE rule will result in some fossil fuel plants running more often and delaying their retirement, which would mean increased emissions of dangerous pollution as compared to the Clean Power Plan, and even as compared to no rule at all," the groups said in their statement.

Many more environmental groups and some states are expected to ask the D.C. Circuit to review the ACE rule (Energywire, June 20).

Clean Power Plan opponents could also soon ask the court to either dismiss or continue to put on hold a separate challenge over the Obama rule.

The ACE rule is set to take effect Sept. 6.

Administration

E&E Daily

Votes set on judicial, EPA picks

https://www.eenews.net/eedaily/2019/07/08/stories/1060708891

Manuel Quiñones

The Senate will take a procedural vote this evening on the nomination of Daniel Bress to sit on the 9th U.S. Circuit Court of Appeals.

Senate Majority Leader Mitch McConnell (R-Ky.) also took steps before the Fourth of July recess to bring up the nomination of Peter Wright to be assistant EPA administrator for the Office of Solid Waste.

The Senate Environment and Public Works Committee approved the former DowDuPont Inc. lawyer on a party line vote of 11-10 earlier this year.

Last month, the Senate approved Lane Genatowski to be director of the Advanced Research Projects Agency-Energy and Robert Wallace to be assistant secretary for fish and wildlife at the Interior Department.

Greenwire

IG to look at staff assignments

https://www.eenews.net/greenwire/2019/07/08/stories/1060712499

Kevin Bogardus

EPA's internal watchdog is planning to review employee assignments that could have them working outside the agency.

EPA's Office of Inspector General said in a notice dated last Monday that it has begun "preliminary research" on the agency's use of assignments under the Intergovernmental Personnel Act. IPA assignments provide for temporary details of staff between federal agencies and eligible organizations like state and local governments, academic institutions and research centers.

"Our objective is to determine whether the EPA's use of assignments under the IPA is in accordance with federal requirements and EPA established policy and procedures, and whether the assignments achieved their intended results," said the memo, which was signed by John Trefry, director of EPA OIG's Forensic Directorate based in its audit office.

Auditors will review records for IPA assignments made between June 2016 through the end of May this year. They will conduct interviews with employees and managers to better understand the assignments. The review's anticipated benefits are "to improve operational efficiency."

The review of EPA's IPA assignments was included on the inspector general's fiscal 2019 annual plan, marked as "new discretionary" for its forensic directorate.

The IG office's review of the assignments could shed new light on the tenure of former EPA Administrator Scott Pruitt.

Senior career officials said to have clashed with Pruitt over management and spending issues were moved elsewhere. Some were given IPA assignments and left the agency to work on those temporary details.

Reginald Allen, former acting deputy chief of staff at EPA, reportedly raised concerns over Pruitt's travel and spending. Last year, he was reassigned under the IPA for a one-year detail at George Mason University (Greenwire, April 13, 2018).

Allen has since left EPA. He joined the Federal Transit Administration in April this year.

Allen declined to comment when contacted for this story.

CAFE

E&E News PM

EPA adviser says final rule coming soon

https://www.eenews.net/eenewspm/2019/07/08/stories/1060712829

Maxine Joselow

An EPA adviser says the Trump administration appears close to finalizing its rollback of Obama-era clean car standards.

John Graham, a member of EPA's Science Advisory Board, told E&E News he noticed a strong sign today that the final rule is imminent.

The Department of Transportation today published a peer review of its analysis underpinning the rule — typically the last step before sending the final rule to the Office of Management and Budget for review.

"This is a suggestion that DOT is wrapping things up, since they are releasing the peer reviews publicly," Graham said in an email.

"I would say it is a sign that the package will soon be submitted to OMB for review, the last step before public release of the final rule," said Graham, who previously served as President George W. Bush's regulatory czar and is now dean of public and environmental affairs at Indiana University.

In its spring regulatory plan, EPA said it hoped to finalize the clean cars rollback in June (Greenwire, May 22). But critics questioned the feasibility of that goal, and the agency ended up blowing past its own deadline.

The rollback is a joint rulemaking between EPA and the National Highway Traffic Safety Administration, a division of DOT.

The two agencies are proposing to allow cars to travel 37 mpg in laboratory conditions by 2025, rather than the 54.5 mpg benchmark mandated by Obama.

Just as consequentially, the agencies are proposing to rescind California's legal authority to set tougher tailpipe pollution rules than the federal government.

The rollback is one of the last major initiatives of outgoing EPA air chief Bill Wehrum, who abruptly announced his resignation late last month (Greenwire, June 26).

Graham said he is "not sure how fast EPA is moving" in the absence of Wehrum.

An EPA spokeswoman redirected E&E News to NHTSA, which didn't immediately respond to a request for comment this afternoon.

CAFOs

Bloomberg Environment

Goldman Banker Snared by AI as U.S. Government Embraces New Tech

https://news.bloombergenvironment.com/environment-and-energy/goldman-banker-snared-by-ai-as-u-s-government-embraces-new-tech

Cheryl Bolen

- Advanced data analytics flags areas for examination
- Humans still needed to create actionable intelligence

The Securities and Exchange Commission used a proprietary algorithm to spot suspicious trading that will soon send a former Goldman Sachs Group Inc. banker to prison.

That case is only one example of the rapid adoption of artificial intelligence across the U.S. government. About half of the top 100 regulatory agencies are now using one or more types of AI to carry out their daily work, according to researchers from Stanford and New York universities who are cataloging its use and expect to publish their findings later this year.

For now, "in very few instances have we observed algorithms truly displacing the final exercise of human discretion by agency employees or officials," said Daniel Ho, law professor at Stanford Law School and one of the team leaders working on the project for the Administrative Conference of the U.S. But AI is pointing the way to using "historical agency data'' to predict real-world behaviors.

At the Social Security Administration a text processing tool will be able to scan a draft decision in a disability benefits appeal to extract functional impairments and compare them to the occupational title, to help attorneys or judges decide if the individual cannot be gainfully employed.

And the Patent and Trademark office is testing an algorithm using advanced computer vision that can search images in an application and analyze how similar they may be to images already trademarked.

Inconsistencies Flagged

Far more than a keyword search, AI is an advanced form of machine learning where an agency's data is used to train an algorithm to aid in decision-making. Right now, it's used primarily to assist agency staff faced with hundreds if not thousands of text-based filings by looking over all the data and suggesting areas that may be worth further examination, enforcement or adjudication, developers said.

For now, natural language processing—a computer's ability to understand language and text—is incapable of making end-to-end assessments. Instead, machines are shrinking the haystacks to help human evaluators and subject-matter experts find the needles.

The haystacks are huge. At the Social Security Administration, about 1,600 judges must make about 500,000 adjudication decisions annually. The EDGAR electronic-document system at the SEC receives 100,000 to 120,000 submissions per year, mostly text-based. At the PTO, about 600 trademark attorneys get about 600,000 time-consuming applications per year.

The algorithm being piloted by the PTO could take the World Wildlife Fund panda logo, for example, and search for similar marks from disparate data sets, coming back with a ranked set of possible matches, said David Engstrom, law professor at Stanford Law School also working on the ACUS project.

"Very quickly, AI technologies are evolving from far-off dreams of science fiction to mainstream, everyday uses that take computers to new levels at awe-inspiring speeds," said Patent and Trademark Office Director Andrei Iancu in a speech in January.

Finding Pandas and Pigs

But for all its promise, there is a risk to relying on AI.

"It could be a better tool and yet it could be subject to gaming," Engstrom said. "Better-heeled members of the regulated community may be able to reverse engineer the tool and figure out what the agency is doing, and then duck enforcement," he said.

That fear explains why agencies are reluctant to discuss specifics of what tools they use and how they work.

The SEC won't discuss how its algorithms spotted insider trading last year by former Goldman Sachs Group Inc. banker Woojae "Steve" Jung, who pleaded guilty and last month was sentenced to three months in prison.

"The Division of Enforcement uses a number of tools to identify suspicious trading and abuses perpetrated on retail investors by financial professionals," said SEC Chairman Jay Clayton in June, where he broadly outlined a few of the commission's techniques for analyzing data.

Some agencies are earlier adopters than others.

Stanford scholars demonstrated how recent advances in image-learning techniques could vastly improve regulatory enforcement of concentrated animal feeding operations by the Environmental Protection Agency.

EPA has estimated that nearly 60% of CAFOs do not hold permits, but they're hard to locate. Using satellite images downloaded from the Department of Agriculture, the Stanford scholars successfully trained two convolutional neural networks to detect the presence of pig and poultry CAFOs in North Carolina.

At present, however, EPA is not aware of any use of AI regarding CAFOs, an agency spokesperson told Bloomberg Government. The EPA is using AI in a program that allows scientists to mimic human behaviors that risk exposure to chemicals.

What the Future Holds

Legal scholars are looking to the future of AI and its implications for administrative law.

There's a question of how courts overseeing challenges to regulations would review questions about whether the agency had adequate reasons for decisions made by machines, said Catherine Sharkey, law professor at NYU School of Law also working on the ACUS project.

That applies whether it's a decision made by a machine, or about one. The National Highway Traffic Safety Administration may be asked to approve fully autonomous vehicles, which could dramatically reduce accident fatalities caused by human error, Sharkey said. The challenge is how regulators measure whether the AI components of autonomous operations pose unreasonable risks.

"To me, all sorts of questions about how we're going to go about regulating health and safety risks in society are implicated by this topic," Sharkey said.

Cary Coglianese, law and political science professor at the University of Pennsylvania Law School, said he envisions a day in which certain benefits or licensing determinations could be made using AI alone, without human intervention.

Machine learning algorithms are sometimes called "black-box" algorithms because they learn on their own—effectively making choices as they work through vast quantities of data to find patterns—making it difficult to say exactly why a specific determination was made, Coglianese said.

"Some observers will see automated, opaque governmental systems as raising basic constitutional and administrative law principles," he said.

Yet legal analysis supports agency use of machine learning, Coglianese said. At the same time, agencies have to be willing to spend on infrastructure, have people who understand how AI tools work, and be transparent about how decisions are made, he said.

Chevron Doctrine

Bloomberg Environment

EPA Aims to Tie Democrats' Hands for Good on Power Plant Carbon

https://news.bloombergenvironment.com/environment-and-energy/epa-aims-to-tie-democrats-hands-for-good-on-power-plant-carbon

Abby Smith

- Clean Air Act limits scope of carbon controls for power plants, agency says
- Tactic faces higher legal bar but could hamper future administrations' authority

The Trump administration's legal strategy for overturning Obama-era power plant carbon dioxide controls goes beyond simply arguing it has the right to regulate differently, to contend that its way is the only way.

If successful, the Environmental Protection Agency could close the door on any future Democratic administration using that section of the Clean Air Act to expansively regulate climate-warming emissions from power plants. The power sector was the second-largest emitter of greenhouse gases in the U.S. in 2017, according to EPA data.

But the legal tactic is also risky, critics and supporters both say. If the argument fails, it could fail big—sending the EPA's repeal and replacement of the Obama-era rule, known as the Clean Power Plan, back to the agency for a redo.

The EPA's rewrite was published in the Federal Register on July 8, starting a 60-day clock to sue. Several state attorneys general, including those in California, New York, and Massachusetts, have said they will challenge the rule.

"They're playing a purist's game," Joseph Goffman, former senior counsel in the EPA's air office during the Obama administration, said in an interview. "The authors of this strategy are very, very skeptical of any kind of climate policy and dead set against the EPA using the Clean Air Act as an authority for such a policy."

Goffman is now executive director of Harvard University's Environmental and Energy Law Program.

"The current EPA leadership is trying to shrink the EPA's Clean Air Act authority over greenhouse gases so it's small enough that they can 'drown it in a bathtub,' " he added, likening the agency's tactics to Americans for Tax Reform President Grover Norquist's famous quote about cutting the size of the federal government.

Chevron Doctrine

At issue is the legal doctrine known as *Chevron* deference. That doctrine—tied to the 1984 *Chevron U.S.A., Inc. v. Natural Resources Defense Council* case—tees up a two-step test for whether the courts should defer to agencies' interpretations of federal statute.

Under step two of the *Chevron* doctrine, if an agency determines that a federal statute is ambiguous, it can get deference—or leeway—from the courts to interpret the language, provided its interpretation is reasonable. The Obama EPA used such an argument to support the Clean Power Plan, which set first-time limits on carbon dioxide emissions from existing power plants.

Agencies typically have an easier time winning deference under that approach, legal observers say, but it leaves room for a future administration to reverse course.

To get rid of the Clean Power Plan, the EPA under President Donald Trump is using a *Chevron* step one justification.

Under that step, instead of explaining why its interpretation of the statute is reasonable, a federal agency must argue that its version is the *only* way to read the law.

It is a much higher legal bar, but a court win could have a much more permanent result, according to observers. It could tie the hands of any future administration that wanted to deviate from that interpretation.

'Congress Spoke Directly'

The EPA's replacement—unveiled June 19 and known as the Affordable Clean Energy, or ACE, rule—sets narrow requirements that are based solely on what individual power plants are able to achieve through efficiency improvements.

The Clean Power Plan included efficiency upgrades, but also encouraged utilities to switch to cleaner burning natural gas and renewable energy.

Trump EPA officials, however, said that approach was unlawful and far exceeded the agency's authority.

The EPA can set requirements based only on what an individual facility can achieve, and that is the sole way to read the Clean Air Act language, the agency argued.

"Congress spoke directly in *Chevron* step one terms" to that question, the rule reads.

Question for the Court

Because of that, the EPA's rule tees up the possibility that the courts could decide fairly definitively on the scope of the agency's authority.

Many legal observers say the court would have two choices: agree with Trump's EPA that the statute can be read only one way, or send the entire Affordable Clean Energy rule back to the agency to rewrite.

The latter outcome would drag the EPA back from the regulatory finish line that has taken the Trump administration two and half years to cross. Retooling the legal underpinning for the Affordable Clean Energy rule could take the agency at least several months.

The closer it gets to the 2020 election, the higher the risk a new Democratic administration could trash the Trump EPA rule in favor of doubling down on the Obama-era approach.

With little room for middle ground in the courts, even backers of the Trump EPA's rule acknowledge the *Chevron* step one path is a more challenging one.

"If the EPA had simply wanted to have the ACE rule upheld, they would have said, 'We think this is the best way to read the statute,'" taking a *Chevron* step two approach, Jeff Holmstead, a partner at Bracewell LLP and former EPA air chief in the George W. Bush administration, said during a June 27 event hosted by the nonpartisan research group Resources for the Future.

'Very Steep Hill'

Critics of the EPA's rule are already poking holes in the agency's argument.

Central to the EPA's justification is its narrow read of the "best system of emission reduction" as laid out by Clean Air Act Section 111(d).

Under the Affordable Clean Energy rule, the "system" is confined only to what individual power plants can do. That is in contrast to the Clean Power Plan, which considered the power grid as the "system."

It could be difficult for the EPA to defend its narrow reading as the only one, critics say, especially given just two years earlier the agency argued a much broader view before the U.S. Court of Appeals for the District of Columbia Circuit, the court that will hear any lawsuit over the new rule.

Legal challenges to the Clean Power Plan were fully briefed and argued before the full D.C. Circuit before the 2016 election.

"The word 'system' is very broad, and Congress knows how to use restrictive language when it wants to," Megan Ceronsky, executive director of the Center for Applied Environmental Law & Policy, said in an interview.

"To argue before a court that the phrase 'best system of emission reduction' can only be interpreted in an extremely constrained and rigid way is hard," added Ceronsky, who served as a climate and energy adviser in the Obama White House. "They are trying to push a very big rock up a very steep hill."

The High Court

But even agency critics acknowledge that the Supreme Court's makeup could tip the legal scales in the EPA's favor.

Conservative-leaning justices like Neil Gorsuch and Brett Kavanaugh, for example, have raised questions about the court's use of *Chevron* deference. During his time on the D.C. Circuit, Kavanaugh expressed strong skepticism of Obama-era greenhouse gas rules.

And three of the sitting justices dissented in *Massachusetts v. EPA*, the landmark 2007 case that found the agency has authority to regulate greenhouse gas emissions.

Were the Supreme Court to ultimately agree with the Trump administration, "then you can't have anything that looks like a Clean Power Plan," Ann Carlson, an environmental law professor at the University of California Los Angeles, said in an interview.

"You really cabin the flexibility to come up with a rule that would result in greater greenhouse gas emissions reductions," she added.

Bloomberg Environment

Trump Climate Strategy May Be Hard to Undo Later

https://news.bloombergenvironment.com/environment-and-energy/trump-climate-strategy-may-be-hard-to-undo-later-49

Susan Bruninga

The Trump administration's strategy for overturning Obama-era power plant carbon dioxide controls also aims to make it difficult for a future Democratic administration to use a particular section of the Clean Air Act to expansively regulate greenhouse gas emissions, Abby Smith reports.

- The EPA's plan uses the *Chevron* doctrine—a policy emanating from a 1984 Supreme Court decision giving agencies authority to interpret ambiguous language in a statute as long as it's reasonable. But rather than focusing on the doctrine's step of explaining why an agency's interpretation of the statute is reasonable, the strategy relies on the step that says a federal agency must argue that its interpretation is the *only* way to read the law.
- The Trump administration approach must clear a much higher legal bar, but its success could be harder to overturn, some say. Others warn the strategy is risky. If the administration's argument fails, it could mean sending the EPA's repeal and replacement of the Obama-era rule, known as the Clean Power Plan, back to the agency for a redo.

Alaska's Arctic Research May Be Frozen

The University of Alaska's Arctic research faces an uncertain future as it waits for the final word on a possible $130 million cut to state funding for this fiscal year, Maya Goldman writes.

- Republican Gov. Mike Dunleavy vetoed $130 million from university funding, along with 181 other budget line items, on June 28 in order to increase to $3,000 the annual share of the state's oil industry revenue that each Alaskan receives annually.
- At the International Arctic Research Center at the University of Alaska Fairbanks, researchers study all aspects of the changing Arctic climate, including ocean acidification, which makes it harder for marine life to survive, and permafrost, which is perpetually frozen ground that has trapped significant amounts of carbon.

California Wants Action on Old Waste Treaty

The California Senate wants the U.S. Congress to finally ratify the 1989 Basel Convention, a treaty dealing with how hazardous waste moves from country to country that was just amended in May to include plastic.

The U.S. signed the treaty, but Congress never ratified the agreement.

California's Senate voted 28-0 on Friday for a resolution urging ratification and for Congress to restrict the import and export of wastes covered by the agreement.

What Else We're Watching

- California state Assembly holds hearing Tuesday on a "Trump insurance" bill, which would require state agencies to track federal changes to environmental and worker protection laws. A joint legislative hearing on the state's climate change policies is also on tap.
- Cleanup efforts continue in order to dampen the impact of a spill of millions of gallons of Jim Beam bourbon on a river and fish downstream from Frankfort, Ky.
- The Senate is expected sometime this week to confirm Peter Wright to lead EPA's Office of Solid Waste.
- The 45th Annual Summer Meeting of the Toxicology Forum takes place in Alexandria, Va., Monday through Wednesday.
- The House Rules Committee takes up the annual defense authorization bill, with dozens of amendments expected, including those on the possible regulation of fluorinated compounds known as PFAS.

Legal Spotlight: Greenberg Lawyer Has Civil Rights Background

Civil rights and energy law may not seem connected at first glance. But when the opportunity arose more than 10 years ago for Rabeha Kamaluddin to switch from being a civil rights attorney to one who works with energy companies, it seemed like a natural transition.

"When I was looking at energy, what I saw was a legal area that was tied to development," Kamaluddin told Bloomberg Environment.

Over a decade later, she's built a client base of businesses in the oil, gas, and electric power sectors who are working to create renewable energy or to strengthen access to oil and gas in small, remote towns.

"That was my motivation," Kamaluddin said. To "help people on all levels be able to strengthen everyone's access to natural resources."

Last month, Kamaluddin made another career change. She's staying in the energy field as a shareholder in Greenberg Traurig LLP's Washington office.

She hopes to use her multidisciplinary approach to energy law to help Greenberg Traurig strengthen its presence in oil, gas, and electric energy law. She's also excited to use the resources the international firm can provide to expand her own client work.

Already in her first month, Kamaluddin said she's been able to connect her clients to other Greenberg Traurig services.

"It would have been difficult to do that in some other places," she said. —*Maya Goldman*

E15

The Washington Examiner

Opinion: The push for year-round E15 is upon us, but is it the best biofuel option?

https://www.washingtonexaminer.com/opinion/op-eds/the-push-for-year-round-e15-is-upon-us-but-is-it-the-best-biofuel-option

Jeff Wasil 07/08/19 8AM

Jeff Wasil leads marine outboard engine emissions testing and certification at Bombardier Recreation Products Evinrude Product Development Center.

The Environmental Protection Agency's long-standing mission is to protect human health and the environment, so it seems counterintuitive that the agency would promote policies that allow more pollution and jeopardize consumer safety. Yet, the EPA did just that with its recent official announcement approving the year-round sale of 15% ethanol fuel.

Ultimately, by approving year-round sales of E15, the EPA is implicitly condoning an increase in pollution, given that the move requires an extension of a pollution waiver to allow an increase in the vapor pressure of the fuel. The use of E15 also results in fewer miles per gallon in automobiles compared to E10 and increases the number of times consumers must fill up their gas tanks.

But the damaging effects of the EPA's actions go beyond pollution. Often marketed to consumers as unleaded 88, E15 damages marine engines and many other recreational products. In fact, some engines are federally prohibited from using it because catastrophic engine failures have occurred.

The EPA has done a poor job of requiring fuel retailers to communicate and warn consumers of the dangers of E15. The only warning the EPA provides consumers is in the form of a small sticker strategically hidden on gasoline fuel pumps.

According to a recent study, more than 60% of consumers mistakenly assume that any gas sold at standard stations is acceptable for all of their engines. Despite this, the EPA dismissed the need for physical controls and sufficient labeling to prevent misfueling in its rule for year-round E15 sales, even though nearly 9 in 10 Americans believe the U.S. government should do more to educate the public on correct fueling for various engine types. Adding even more of this fuel to the market without proper safeguards will increase the likelihood of consumers misfuelling or selecting a harmful blend, unknown to them, thereby jeopardizing the function of and voiding warranties for millions of marine and off-road engines.

The EPA must ensure that consumers are fully aware of the damage that can occur if E15 is inadvertently used in unapproved engines. Prompting consumers to confirm their fuel choice via electronic keypad on the fuel pump could be one step to further help confirm a consumer's choice and understanding. Additionally, the EPA should mandate the continued availability of E10 to ensure consumers have access to approved fuels.

There's also a better option than E15, one that only requires cutting red tape hindering the widespread usage of a next-generation biofuel: biobutanol. Unlike ethanol, biobutanol contains nearly 90% of the energy content of gasoline (compared to 67% for ethanol), is compatible with the existing fueling infrastructure, does not phase-separate in the presence of water; behaves similarly to gasoline, lowers evaporative emissions, and can be blended with gasoline at up to 16.1% by volume while remaining compatible with engines and fuel systems.

Broadly, biobutanol has all the positive properties of gasoline without the negatives of ethanol. What's more, biobutanol is currently produced from the same feedstocks that go into ethanol, meaning there are no negative impacts on existing farming infrastructure and stakeholders, such as corn growers, transporters, processors, and fermenters.

The recreational marine industry has worked proactively to successfully test, validate, and approve the use of biobutanol. Supported by the U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, and Argonne National Laboratory, my company, Evinrude, has been integral to a five-year comprehensive testing program including the American Boat and Yacht Council, and other boat and engine manufacturers across the industry, in helping commercialize biobutanol in limited markets across the U.S.

The EPA currently grants waivers that allows E10 to exceed evaporative emission standards, but biobutanol lowers evaporative emissions in the summer. Unfortunately, the EPA's regulation technically makes it illegal for a fuel to pollute less.

Some states have found solutions to this EPA requirement. In Texas, for example, consumers have access to renewable biobutanol and can choose between biofuels.

While the ethanol industry has been afforded numerous economic incentives in the form of subsidies and low-interest loans, biobutanol producers only want the chance to fairly compete in the marketplace. Ethanol should not be the only choice for consumers.

Given the many demonstrated benefits of biobutanol, especially compared to E15, the EPA's approach to consumer education and widespread adoption of E15 is irrational and contradicts its own mission. We need our government agencies to adopt common sense policies that protect consumers above all else. I urge the EPA to fulfill its duty to the environment and the American people by encouraging the exploration of alternative fuels in its place, like biobutanol.

FOIA

The Hill

Lawmakers talk legislation in response to FOIA changes

https://thehill.com/policy/energy-environment/451634-lawmakers-talk-legislation-in-response-to-foia-changes

Miranda Green

Senators from both parties are unhappy with new Trump administration rules giving political appointees at two government agencies more power to review public information requests, and they say they may craft legislation to fix it. The new rules for considering Freedom of Information Act (FOIA) requests at the Interior Department and Environmental Protection Agency have provoked complaints from the media and outside groups, and the senators say they go in the opposite direction in terms of providing access to government records.

"In a self-governed society, the people ought to know what their government is up to," said Sen. Charles Grassley (R-Iowa), who has led the charge on this issue and is considering legislation.
"Transparency laws like the Freedom of Information Act help provide access to information in the face of an opaque and obstinate government. Unfortunately, a recent Supreme Court ruling and new regulations at EPA and the Department of Interior are undermining access," he said in a late June speech on the Senate floor.

"The public's work ought to be public. So, I'm working on legislation to address these developments and promote access to government records."

Sen. Ed Markey (D-Mass.) is also considering legislation in response to the new rules.

"We are exploring our options, including legislative, to limit awareness review and supplemental awareness review," a spokesperson for his office told The Hill.

The new rules ushered in at Interior and the EPA could give the agencies more flexibility to deny public document requests.

Interior during the government shutdown in December proposed a new rule that allows political appointees the option to see requests related to them before they are released. The new rule is called an "awareness review."
The EPA at the end of June released a final FOIA rule that, among other things, expands the number of political appointees who can approve or deny FOIA requests. The agency argued the rule did not have to be subjected to a public comment period and that the changes were not substantial.
The same week, the Supreme Court issued a blow to FOIA advocates, ruling that private businesses did not have to divulge proprietary information under public information act requests regardless of whether there was any anticipated harm from the release.

The new FOIA rules at Interior and the EPA have alarmed environmental groups, who are calling for Congress to get involved.

"We've seen some really troubling attacks on transparency and the Freedom of Information Act, specifically of late," said Emily Manna, a policy analyst at Open the Government, a group that's been working with Grassley's office on possible legislation.

"It's important to us to try to achieve some bipartisan FOIA reform to achieve those issues. We've been working closly with FOIA champions in the Senate and House to come up with those solutions," she said.

It's not clear what other senators might be working with Grassley, though several of his colleagues signed on to a letter earlier this year decrying moves away from transparency in the FOIA process.

Grassley and Sens. Patrick Leahy (D-Vt.), John Cornyn (R-Texas) and Dianne Feinstein (D-Calif.) in March raised concerns about what they deemed a culture of secrecy coming from the federal government.

In a letter to the Justice Department's Office of Information Policy, the senators highlighted a number of issues, including a lack of response from agencies over requests and month-long delays that often lead to FOIA lawsuits.

"We write to express concern about recent trends in FOIA compliance and reports indicating a continued culture of reflexive secrecy across the government," the letter read.

Manna pointed to the fact that EPA did not provide a public comment period for its FOIA rule as one of the troubling trends her group would like to see addressed in any FOIA amendment. She also noted the recent Supreme Court FOIA case as an issue they'd like to address.

"FOIA champions and folks who are supportive of FOIA transparency in general, share the concern that the Supreme Court decision is going to severely limit the kinds of information the public can get from private companies who are giving info to the federal government — that is very troubling," she said.

It is not uncommon for the laws that set the basis for FOIA to be amended. Congress passed the latest version of the FOIA law in 2016. It was that bill that EPA is using as the basis for its updated FOIA regulations.

But reforming the FOIA rule to bind the influence of political appointees across government agencies could come in various forms, experts say.

"FOIA has specific deadline provisions. What a legislative fix could do is specify what conditions are not legal, for those deadlines to be met. They could specify that only under these exceptions could these deadlines be pushed back. A legislative fix could also explicitly provide for the fact that political appointees are not allowed to take part in FOIA determinations," said Yvonne Chi, associate attorney for Earthjustice.

"It would definitely be an amendment to FOIA, those aren't that uncommon," Kevin Bell, staff counsel for the Public Employees for Environmental Responsibility, on what shape a bill would have to take.

"With an amendment there's a lot of ground to cover. I think a lot of people looking at this are thinking, 'What is my wish list.'"

Bell said the fact that Republicans are involved show that support for open records laws spans both sides of the aisle.

"I think that Republicans in Congress are aware of the fact that no matter who is in control of the presidency, they want a strong Freedom of Information Act law. There is always something that you can be FOIAing someone for, whether you are left or right," he said.

"Once a new administration comes down the line sometime, I think that everyone knows that they are going to want to be able to ask the same questions and be guaranteed by the statute they will get answers."

Generator Standards

Greenwire

Alaskans cheer as EPA moves to ease generator standards

https://www.eenews.net/greenwire/2019/07/08/stories/1060712609

Sean Reilly

Prodded by Alaska lawmakers, EPA is poised to roll back particulate matter emissions standards for diesel generators used in large swaths of the state.

Rather than comply with a requirement to use particulate filters, new diesel generators in "remote" areas of Alaska will have to meet a more lenient Tier 3 standard, the agency said in a "**direct final rule**" published in Friday's *Federal Register*.

That approach is typically reserved for regulations deemed to be uncontroversial. The change will take effect Oct. 3 unless "significant adverse written comment" is received by early next month or a public hearing is requested by this coming Wednesday, according to the rule. As a fallback, EPA on Friday also published a **proposed rule**.

In explaining the planned change, EPA officials cited concerns about the reliability of filter-equipped generators in isolated Arctic communities that may lack other electricity sources. While Alaska recognizes the importance of reducing particulate matter emissions, Tier 3 engines are still "notably cleaner" than the "non-certified" models currently used in rural parts of the state, then-Gov. Bill Walker (I) said in a 2017 **letter** to EPA requesting the rollback.

But a recent agency **analysis** included in the online regulatory docket predicts the change will lead to tons of added particulate pollution in comparison with the status quo. The decision to pursue it is the latest in a series by the Trump administration to administratively weaken or delay enforcement of niche air quality regulations after legislative attempts to do so were unsuccessful.

In this instance, a 2017 bill, **S. 1934**, sponsored by Republican Alaska Sens. Dan Sullivan and Lisa Murkowski to relax the standards, cleared the Senate late last year, but then died in the House. Rep. Don Young (R-Alaska) introduced a similar House measure, **H.R. 422**, this past January, but it has yet to get a hearing from the House Energy and Commerce Committee.

In a statement to E&E News, Young cheered EPA's decision as "a great victory" for remote Alaska communities.

"New generators are very costly, and families shouldn't be burdened by an arbitrary decision made by bureaucrats 4,000 miles away," Young said. "I thank Administrator [Andrew] Wheeler for his partnership in implementing this rule, and I will continue working with the Alaska delegation to ensure that it is made permanent through legislation."

As of this morning, spokespersons for Sullivan and Murkowski had not replied to requests for comment made Friday. "Continued pressure from some Alaskan elected officials may have played a role, but it is also just another example of this administration's many attempts to eliminate pollution controls wherever it can without regard to public health and the environment," Jeremy Lieb, an Earthjustice attorney based in Anchorage, said in an email.

Particulate matter, often dubbed soot, is linked to an array of heart and lung ailments, including a higher risk of premature death for some people.

The rule published Friday defines "remote" Alaska communities as those that are off the federal aid highway system and/or not connected to the statewide electrical grid. The number of people living in those communities could not immediately be determined; a Senate committee report accompanying the Sullivan and Murkowski legislation last year pegged the number of remote Alaskan villages at more than 200, adding that the majority "are powered either primarily by diesel generators or by back-up diesel generators where renewable energy is available."

The rule notes that the Obama-era EPA in 2011 had dropped a requirement for those generators to comply with the latest emission standards for nitrogen oxides, carbon monoxide and non-methane hydrocarbons when that necessitated the use of a pollution control technology known as selective catalytic reduction.

The Trump administration, however, has shown repeated willingness to give other select industries leeway in compliance with Clean Air Act regulations when legislative efforts fall short.

As part of a plan to repeal the legal justification for the 2012 Mercury and Air Toxics Standards, for example, EPA has proposed to carve out a partial exemption for plants that burn coal refuse for fuel.

A handful of those facilities have been unable to meet the acid gas limits in the standards; under the proposal, EPA would create a subcategory for plants that burn eastern bituminous coal refuse. In the meantime, the agency is allowing four of those facilities to stay in business until at least next April under separate **compliance orders** quietly issued this spring. A 2017 bill, **H.R. 1119**, sponsored by then-Rep. Keith Rothfus (R-Pa.), to provide the carve-out passed the House but then died in the Senate. Rothfus lost his reelection bid last November.

Similarly, under a proposal published last November, EPA is exploring the option of pushing back the final compliance date for 2015 emission standards for new wood stoves and other wood-fired home heating systems.

The current deadline is May of next year. Legislation in the 115th Congress by Rep. Collin Peterson (D-Minn.) to delay it under May 2023 also failed to win final passage. A separate bill, **H.R. 1281**, introduced this past February by Rep. David Rouzer (R-N.C.), would scrap the standards altogether; it is awaiting action by the House Energy and Commerce Committee.

In June of last year, EPA administratively **offered** brick manufacturers another year to meet a 2015 set of limits on releases of mercury and other hazardous pollutants. Legislation by Rep. Bill Johnson (R-Ohio) to freeze compliance until all litigation surrounding the 2015 regulations was settled had also previously failed to clear the Senate.

HFCs

Politico Pro

Sources: Kennedy, Carper plot new path on HFCs

https://subscriber.politicopro.com/article/2019/07/kennedy-carper-have-plan-to-cut-down-key-coolant-1568175

Eric Wolff 07/08/19

Sens. John Kennedy (R-La.) and Tom Carper (D-Del.) are planning a new legislative push to give EPA a regulatory framework to phase out a coolant that contributes to climate change, but they'll need to win the backing of a skeptical White House and Republican leadership in the Senate, according to industry and Hill sources familiar with the effort.

A bill the two lawmakers are writing aims to authorize EPA to create rules to reduce use of hydrofluorocarbons, which would put U.S. in step with dozens of other countries that are curbing their use of the chemical under the Kigali Amendment to the Montreal Protocol that took effect at the beginning of the year, according to the sources.

The U.S. has not ratified that amendment, and the legislation differs from measures Kennedy and Carper have introduced in the past in that it does not cite Kigali — a strategy designed to make it palatable for the White House.

U.S. companies that manufacture the coolants that would replace HFCs used in refrigeration, air-conditioning and aerosols have been unable to convince the Trump administration to submit the amendment to the treaty to the Senate for approval, and their argument that implementing it would promote U.S. trade and manufacturing jobs has fallen flat.

While the U.S. still has plenty of time to meet the HFC phase-down schedule laid down in the Kigali Amendment, industry sources tell POLITICO that foreign coolant companies are benefiting from U.S. inaction and positioning themselves to quickly meet the growing global demand for replacement chemicals. And over a dozen states are moving to implement their own HFC regulations.

"We started to pursue a legislative path on this so the economics associated with the bill won't be lost, and because we're starting to see a patchwork of state-based action," an industry source told POLITICO.

The effort by Kennedy and Carper is an attempt to put Congress in charge of the process rather than the White House, which has opposed both multilateral agreements and climate change regulations, including the Paris climate agreement.

Worldwide phase-down of HFCs is expected to avoid 0.5 degrees Celsius of warming by 2100. In the Senate, 13 Republican senators have signed a letter in support of the treaty, which, along with 47 Democrats, would provide a filibuster-proof majority for any bill.

“Ratification of the Kigali Amendment is a no brainer,” Carper said on the Senate floor in February. “Even those skeptical of climate change ought to be able to admit it is great for U.S. competitiveness and good for good-paying American jobs.“

But White House backing is crucial for any effort in Congress to reduce HFC use, since Republican leadership will need to green-light the measure. Sen. John Barrasso (R-Wyo.), chairman of the Environment and Public Works Committee that would consider the bill, has indicated he's reluctant to act on HFCs.

“Consumers and businesses need clear rules and regulatory certainty," he told POLITICO in a statement last week. "I have concerns with any legislative effort that will create more regulatory confusion across the country by layering new federal rules on a patchwork of state rules.”

And the industry knows that winning over Barrasso is a necessary first step for the bill.

"The [odds] that Chairman Barrasso is going to move legislation that he doesn’t get a very strong signal from the administration that he ought to be moving is zero," said one industry lobbyist.

Industry lobbyists say they have been working to convince the administration to take action since Trump took office, and they are optimistic they've made some inroads. While there are some officials opposed to climate action inside the White House, there is no united front on HFCs.

"There’s a number of different views within the administration on this," said a manufacturing industry source. "I don’t know that entire agencies are of one mind on this in a lot of places."

The Montreal Protocol, unlike the Paris agreement from which Trump promised to withdraw, provides trade protections for its participants that would shield U.S. companies from Chinese dumping. The industry also says it would promote U.S. manufacturing, since U.S. companies own the next generation technology to replace HFCs.

Treaty opponents believe the market will move toward next-generation coolants on its own, and they doubt the president can be won over to an international treaty that would change the trajectory.

“His position on climate change generally and on U.N. treaties I think was made clear by his withdrawal from Paris, and he would see Kigali as something substantially similar to that,” said Ben Lieberman, a senior fellow at the conservative Competitive Enterprise Institute and a former senior Republican aide on the House Energy and Commerce Committee.

Industry and lobbying sources say there is some support in the administration, but the biggest obstacle is EPA.

Administrator Andrew Wheeler has said that EPA has no legal authority to regulate HFCs. The U.S. Court of Appeals for the D.C. Circuit in 2017 struck down the Obama-era attempt to use the Clean Air Act to reduce HFC use, and though there may be other tools available, EPA has not indicated it was considering any new efforts.

EPA did not respond to a request for comment, but industry sources said agency leadership is reluctant to regulate greenhouse gases any more than they are legally required to.

The Kennedy-Carper bill would establish that requirement, and force EPA to act by creating a regulatory structure outside the Clean Air Act to phase out HFCs on the same timetable as in the Kigali Amendment.

"This would be a new grant of authority that would allow EPA to do this one thing and would not allow future administrations to regulate greenhouse gas emissions any more than the authority they currently have," an industry source said. "This would be a very discrete grant of authority for this one purpose. We hope EPA recognizes that and it’s something they can live with."

Methane and Ethanol

Greenwire

Ethanol industry blasts EPA's 2020 blending targets

https://www.eenews.net/greenwire/2019/07/08/stories/1060712485

Marc Heller

Ethanol advocates dismissed EPA's latest proposal for biofuel volumes in 2020, saying the agency's history of waiving the requirements for some refiners could continue to undermine renewable fuels.

EPA on Friday proposed to maintain at 15 billion gallons the amount of conventional biofuels to be blended into the nation's fuel, and a slight increase in advanced biofuels. The proposed rule will be open for public comments for 30 days and would be made final later this year, if EPA sticks to the congressionally mandated timeline.

Growth Energy, the ethanol industry group, called the proposal "a drop in the bucket compared to the demand lost due to a flood of refinery exemptions."

In a statement, Growth Energy CEO Emily Skor said, "Unless EPA restores demand destroyed through secret handouts to oil giants like Exxon and Chevron, these targets offer nothing but another year of lost opportunity and rural hardship."

To the refining industry, however, the proposal was welcome news for steering clear of controversies related to small-refiner exemptions, granted in cases of economic hardship. Ethanol supporters had called on EPA to reallocate volumes of biofuel waived from some refineries, to others, and to retroactively boost volumes — called the renewable volume obligations — for 2016 based on a federal court ruling.

"Today's announcement stays away from the retroactive rulemaking favored by some biofuel lobbyists," said Scott Segal, a longtime representative of the refining industry. "That means no reopening of the 2016 RVO and no reallocations based on smaller-refiner exceptions. Had EPA gone in any other direction, it could have created profound due process and statutory problems harmful both to the regulated community and the integrity of the RFS itself."

In its proposal, EPA said it wasn't making any adjustments related to refinery exceptions, since none have been granted so far this year. And the agency said it would maintain the volumes from 2016 because of the market's inability to produce much more biofuel than the proposed rule calls for.

More than 30 petitions for refinery exemptions are pending at EPA, and Segal said refiners "look forward to prompt action."

The proposal calls for 2.43 billion gallons of biomass-based diesel for 2021 — a volume that's set two years ahead — holding that level steady compared with next year. Cellulosic biofuels would be set at 0.54 billion gallons. Advanced biofuels would increase by 0.12 billion gallons, to 5.04 billion gallons.

Despite that increase, the Advanced Biofuels Business Council saw shortcomings in the proposal, based on EPA's decision not to reallocate gallons waived from some refineries.

"If the EPA doesn't fully account for lost gallons, we'll continue to see investments in advanced biofuels frozen by uncertainty, shrinking farm markets, and more rural plants idling production," said Brooke Coleman, the ABBC's executive director.

That issue may play out in Congress, where Sens. Joni Ernst (R-Iowa) and Deb Fisher (R-Neb.) have proposed legislation (S. 1840) to force EPA to reassign the exempted biofuel volumes.

Other lawmakers, however, are pressing legislation to limit ethanol mandates. Sen. John Barrasso (R-Wyo.) and other critics of ethanol mandates have urged EPA to maintain its approach to refinery exemptions.

In the proposal, EPA also outlined a handful of possible regulatory changes, including finalizing a proposal to allow biomass-based diesel to be produced from food waste.

A broader reset of biofuel volumes, required because of waivers granted in recent years, will be addressed through a separate rulemaking, EPA said.

Greenwire

Landfill methane rule nears completion

https://www.eenews.net/greenwire/2019/07/08/stories/1060712561

Niina Farah

EPA is nearly done finalizing its proposal giving more time for states to submit plans for controlling methane emissions and hazardous air polluntants from municipal solid waste landfills.

The final rule landed at the White House Office of Information and Regulatory Affairs for review early last week.

It extends a long-passed deadline set by the Obama administration's 2016 updated landfill guidelines, which required states to submit plans for existing landfills to the agency by May 2017.

EPA would now give states until Aug. 29 to provide their plans for controlling the potent greenhouse gas.

It also comes as the agency faces a related and fast-approaching court-ordered deadline for reviewing and approving state plans for slashing landfill methane emissions.

The delayed implementation of the rule is part of a pattern within the Trump administration of seeking to stall deadlines set in place by President Obama, including former EPA Administrator Scott Pruitt's 90-day stay of rules governing emissions from both new and existing landfills in May 2017.

It is also part of an effort by the agency to change how EPA sets compliance dates for states in certain rulemaking.

The rule would match up state plan deadlines more closely with existing timelines for drafting state implementation plans for the National Ambient Air Quality Standards.

This new extended timeline for compliance would apply to all rules for existing sources written under Section 111(d) of the Clean Air Act and was first advanced under the newly finalized Affordable Clean Energy rule.

The finalization of the rule comes as EPA is under court order to review state plans by the beginning of September.

In May, the U.S. District Court for the Northern District of California determined EPA had not met its statutory obligation to control methane and other pollutants (*Climatewire*, May 7).

The district court gave the agency until Sept. 6 to review state plans and until Nov. 6 to develop a federal plan that would apply to those without agency-approved plans.

The ruling was in response to a lawsuit by a coalition of states, led by California Attorney General Xavier Becerra (D), stating that EPA was not enforcing the emissions guidelines, which had gone into effect in October 2016.

EPA was not able to comment in time for publication on how many state plans have already been submitted to the agency.

In a court filing to the district court on June 12, however, the agency stated that California, New Mexico, Arizona, Delaware and West Virginia had each submitted plans for review.

Rachel Fullmer, an attorney for the Environmental Defense Fund, called any further delay in implementing restrictions on methane and hazardous pollutants from landfills "unjustified and unlawful."

"A federal court has already found EPA to be violating its duty to ensure all Americans are protected from landfill pollution, and EPA has already begun complying with the court's order calling for swift implementation. EPA should abandon any further attempts to delay these safeguards," Fullmer said in an email.

Pebble Mining

Greenwire

Corps ignored data, 'underpredicts' Pebble impacts — EPA

https://www.eenews.net/greenwire/2019/07/08/stories/1060712575

Ariel Wittenberg

EPA slammed the Army Corps of Engineers' draft review of the contentious Pebble mine for not including critical information about how the project could affect Alaska's famed Bristol Bay.

In a pair of comment letters totaling nearly 200 pages submitted just before the Fourth of July holiday, EPA cited multiple instances where the Army Corps did not use available data to fully evaluate how the massive copper and gold mine could affect Bristol Bay's wetlands and streams, and the valuable wild salmon fishery they support.

Overall, EPA said the Army Corps' draft environmental impact statement (DEIS) likely "underpredicts" the impacts Pebble could have on water quality, salmon and air quality, and does not "support a reasonable judgment" the project will comply with the Clean Water Act.

As a result, EPA wrote, Pebble may have "substantial and unacceptable adverse impacts" on fisheries in Bristol Bay.

EPA is declaring the headwaters of Bristol Bay "aquatic resources of national importance," or ARNIs — kicking off a process under the Clean Water Act meant to force the Army Corps and EPA to the negotiating table.

It's unclear what, if any, impact EPA's comments criticizing the Army Corps' review could have. Just two weeks ago, EPA resumed the process for withdrawing Obama-era proposed restrictions on mining in the Bristol Bay area (E&E News PM, June 26).

EPA Region 10 Administrator Chris Hladick attempted to address that dichotomy in a letter introduction to the comments, writing that the agency "recognizes that the standard set out" in the Clean Water Act for declaring something an ARNI is "similar" to the standard set by Section 404(c) of the Clean Water Act, which allows EPA to veto the Army Corps' dredge-and-fill permits.

"However," Hladick wrote, EPA's decision to begin the ARNI process "is not a decision regarding its Section 404(c) action and should not be interpreted as such. The EPA has not made a decision regarding whether to withdraw the 2014 Proposed Determination or leave it in place."

Clean Water Act letter

EPA's comment letters focus on concerns related to the Clean Water Act and the National Environmental Policy Act, respectively.

Despite the uncertainty over whether EPA will ultimately lift or retain the proposed Section 404 limits, one thing is clear from the agency's comments: The Army Corps did not include enough information about how Pebble could permanently alter one of the world's premier salmon habitats.

"The EPA has concerns regarding the extent and magnitude of the substantial proposed impacts to streams, wetlands, and other aquatic resources that may result, particularly in light of the important role these resources play in supporting the region's valuable fishery resources," the agency wrote.

Indeed, multiple times throughout the 60-page missive, EPA said the Army Corps did not thoroughly analyze or use the "extensive data" available about the types and functions of wetlands and streams Pebble would destroy or permanently alter.

EPA took particular issue with how the Army Corps handled "cumulative" impacts of the project in its DEIS.

"Potential cumulative effects are mentioned in general terms, with little or no evaluation of these impacts," EPA wrote.

The DEIS, for example, talks about the potential for cumulative effects to surface water, groundwater and sediment. But, EPA wrote, "The DEIS does not estimate the extent of these impacts."

The agency said, "The Corps should characterize the geographic extent of cumulative direct and secondary/indirect effects (e.g. acreage of wetlands and other aquatic resources impacted, miles of stream impacted — by impact types), the expected change in functions provided by the affected aquatic resources, and the severity or significance of these changes."

The cumulative impact on wetlands and streams could have big effects on Bristol Bay's fishery, whose strength is rooted in the genetic diversity of salmon that spawn there — a byproduct of having so many unique and varied types of wetlands.

So knowing exactly how the Pebble mine would alter those wetlands and streams is critical to understanding how it would affect salmon spawning and the fishery.

"The Corps should analyze how the project will affect both the amount and the accessibility of the full complement of habitats that each fish species requires to complete their life histories," EPA wrote.

"If spawning and rearing habitats no longer exist at sufficient levels (in terms of quantity or quality), or no longer exist in proximity to each other, the abundance, productivity, and sustainability of fish populations will be compromised. These habitats need to remain both sufficiently represented and connected, throughout the project area, to sustain resiliency and persistence of fish populations."

But, again, EPA said the Army Corps hasn't conducted crucial analyses to understand the impacts. The DEIS does not include a "comprehensive analysis" of how different fish species are distributed throughout the area affected by Pebble.

The DEIS also doesn't analyze how different fish use different habitats throughout the project site, nor does it assess how many affected stream miles or acres of wetlands are used for spawning, incubation, rearing or feeding, EPA said.

The agency disputes a claim made by the Army Corps that "species diversity and abundance data indicate there is sufficient available habitat for relocation without impacts to existing populations."

EPA said: "The DEIS does not provide support for this statement, and it does not present information on how available relocation habitats were assessed or what constitutes fish habitat."

The agency said the Army Corps should have paid particular attention to how Pebble could lead to "potential loss of genetic diversity of the Bristol Bay salmon portfolio."

"The Corps should also analyze and discuss existing scientific information on the Bristol Bay salmon portfolio and the consequences of genetic biodiversity losses for salmon populations," EPA wrote.

The Clean Water Act requires that all impacts to wetlands and streams be offset by preserving or restoring similar aquatic resources, a process known as compensatory mitigation.

But the mitigation statement Pebble LP submitted to the Army Corps does not include specific mitigation plans for wetlands and streams that the mine will destroy.

Instead, the Army Corps wrote in the DEIS that specific mitigation plans would be determined after it completed its environmental review.

EPA said the public should be able to comment on any mitigation plans. "This is particularly important in light of the significance and complexity of the discharge activities associated with this project," the agency wrote.

This is not the first time EPA has taken the Army Corps' Alaska District to task over compensatory mitigation issues.

Last year, EPA and Army Corps headquarters issued an agreement about how mitigation should be conducted in Alaska after E&E News reported that the Alaska District was not requiring any compensatory mitigation on the majority of Clean Water Act permits (Greenwire, May 29, 2018).

NEPA letter

In addition to reviewing the Pebble mine DEIS under the Clean Water Act, EPA submitted a separate, 115-page review under the National Environmental Policy Act.

Once again, EPA wrote that the DEIS "appears to lack certain critical information about the proposed project and mitigation."

"Because of this, the DEIS likely underestimates impacts and risks to groundwater and surface water flows, water quality, wetlands, aquatic resources, and air quality from the Pebble Project," EPA said.

"Inclusion of the additional information and analyses we have identified, or further explanation in the EIS of these issues, is essential to more fully evaluate and disclose the potential impacts and identify practicable measures to mitigate those impacts," the agency said.

In particular, EPA wrote that "key aspects" of the Pebble mine are being reviewed based only on "conceptual level" information, as opposed to actual designs.

So the agency said more detailed information is needed about things like plans to dewater the mining pit, tailings dams, post-mining reclamation and long-term monitoring.

"Without more detail, many of the predictions associated with these components and plans in the DEIS do not appear to be fully supported based on the current level of documentation," EPA said.

One critical area where the lack of detail matters is spill risk (Greenwire, Feb. 27). EPA noted that the DEIS doesn't "fully characterize the stability and performance of dams" that will hold toxic tailings and whether they could withstand earthquakes.

Furthermore, EPA said that while the DEIS does describe some scenarios in which tailings dams would be breached, it does not evaluate a bulk tailings breach or failure.

The analysis, EPA wrote, "identifies a number of adverse factors that could occur during engineering, construction and operations, but assumes that all of these challenges would be overcome."

"Support for this determination is limited," EPA concluded, because plans for tailings storage submitted to the Army Corps were only "conceptual" and not detailed designs.

Similarly, EPA said the "spill risk analysis for concentrate and tailings warrants improvements." The agency said the Army Corps "may underpredict impacts of spills."

The agency also wrote that the DEIS "may substantially underpredict potentially significant impacts to water quality."

That's because the document makes unsupported assumptions and uses limited data related to how chemicals, like acid and metal, could leach into groundwater and make their way to surface water.

The Army Corps, separately, likely underestimated the impacts of air pollution at both the mine site and a port facility, EPA wrote, because of "assumptions and potential errors" in air quality modeling.

PFAS

E&E Daily

House Dems push climate, PFAS riders to Pentagon bill

https://www.eenews.net/eedaily/2019/07/08/stories/1060708877

Manuel Quiñones

Energy and environment debates will resurface this week when the House takes up its version of the National Defense Authorization Act for fiscal 2020.

The Senate passed its own variation of NDAA, S. 1790, before the Fourth of July recess. It included provisions related to climate and a bipartisan deal on PFAS contamination (*E&E News PM*, June 27).

On the House side, more than 600 amendments are already pending before the Rules Committee, which will meet to discuss which ones to make in order.

Proposed amendments on climate include:

- An amendment from Rep. Veronica Escobar (D-Texas) would require the Pentagon to include expected climate spending in its annual budget requests.
- An amendment from Rep. Eddie Bernice Johnson (D-Texas) would require agencies to provide the Pentagon with the latest climate change data.
- An amendment from Rep. Earl Blumenauer (D-Ore.) would add monitoring and reporting on climate change as a function of the Space Corps.
- An amendment from Rep. Charlie Crist (D-Fla.) to require an accounting of future sea-level rise when creating guidelines for military base resiliency.

Proposed amendments on per- and polyfluoroalkyl substances, or PFAS, include one from Rep. Debbie Dingell (D-Mich.) to require EPA to designate PFAS as hazardous under the Superfund law.

Senate Environment and Public Works Committee ranking member Tom Carper (D-Del.) wanted to attach such language to his chamber's NDAA but was unsuccessful.

Similarly, Rep. Chris Pappas (D-N.H.) introduced legislation last week to list PFAS as toxic under the Federal Water Pollution Control Act.

Other PFAS amendments include:

- An amendment from Rep. Dan Kildee (D-Mich.) to authorize $45 million for the U.S. Geological Survey to review PFAS contamination across the country.

- Another Kildee amendment would require a Government Accountability Office study of the Department of Defense's response to PFAS.
The House NDAA, **H.R. 2500**, already includes climate and PFAS language. Some provisions were in the base bill while lawmakers added others during an Armed Services Committee markup last month (***E&E Daily***, June 13).

Mandates include updated reporting on installations most vulnerable to climate change, authorizing a program for capturing carbon dioxide from air and seawater, and encouraging DOD to stop using PFAS in firefighting foam.

Beyond the defense authorization, leaders of the House Energy and Commerce Committee are promising a PFAS package soon (***E&E Daily***, June 28). Still, the NDAA appears to be the most certain vehicle to approve significant legislation on the issue this year.

Trump Administration

The Hill

Trump's not-so-secret war on state environmental protection

https://thehill.com/opinion/energy-environment/451811-trumps-not-so-secret-war-on-state-environmental-protection

David Coursen

David F. Coursen is a former attorney in the EPA Office of General Counsel and serves in the leadership of the Environmental Protection Network, a nonprofit, volunteer organization of EPA alumni working to protect the agency's progress toward clean air, water, land and climate protections.

Trump's EPA claims to support "cooperative federalism," as a way to "rebalance the power between Washington and the states." But its actual agenda appears to be halting the wave of bold environmental protections emerging from American cities and states. To that end, the EPA now seeks to limit states' authority to protect our climate, while threatening budget cuts of nearly $1.4 billion in state environmental funding.

If this effort succeeds, our towns and cities will face dirtier air, hotter summers and more extreme weather — and there will be less we can do about it.

A centerpiece of EPA's attack on climate protection is its proposal to freeze car emission standards at 2020 levels, which would increase greenhouse gas emissions by 1.7 billion metric tons. EPA also seeks to limit state power by revoking a waiver under the Clean Air Act that allows California and a dozen states that follow its lead to set their own more stringent standards.

State authority to protect air quality has existed in one form or another for half a century. EPA has granted 50 waivers, but has never revoked one. So, it is hard to imagine a more brazen attack on state authority than rescinding this waiver, which was granted five years ago. In effect, Trump's EPA is forcibly enlisting states in the administration's war on climate protection.

Another recent salvo in that war is new guidance that would limit state authority over energy pipelines. Under the Clean Water Act, a pipeline cannot be constructed unless the state certifies that it will not cause violations of any "appropriate requirement of state law." But the new guidance would let the federal government and energy companies run roughshod over state laws aimed at reducing air emissions and addressing climate change.

Along with shrinking state power, EPA's conception of "cooperative federalism" also means shrinking state funding, with a proposed budget that cuts support for state environmental protection by $1.4 billion.

This includes crippling cuts of $500 million in support for state environmental programs, which depend on EPA for more than a quarter of their operating budgets. The biggest cuts, $300 million, are to programs for clean and safe water, with

the remaining $200 million directed at programs that protect air quality and manage hazardous waste, pesticides and toxics. These cuts would starve states of vital resources needed to carry out their role as EPA's partners in administering our nation's environmental laws and responding to emergencies like hurricanes, floods and severe storms.

The budget also proposes $43 million in cuts to brownfields programs that are key to redeveloping our nation's cities. Brownfields are contaminated or polluted sites, often in the heart of America's downtowns and former economic centers. By cleaning and repurposing these sites, cities can improve the quality of urban life and increase property values.

EPA calculates that approximately 129 million people (roughly 40 percent of the U.S. population) live within three miles of a brownfield site that receives EPA funding. As of November 2018, grants awarded by the program have reclaimed 77,000 acres of idle land for productive use, with over 141,300 jobs created and $26.8 billion leveraged.

The EPA's proposed budget would also slash more than $140 million from federal support for state and interstate programs to protect and restore nationally significant water bodies like the Chesapeake Bay, Puget Sound, Long Island Sound and Lake Champlain. America's surface waters are an important source of drinking water for our nation's communities.

But the biggest cuts, a whopping $874 million, are to a pair of highly successful state revolving loan funds that have tremendously improved our nation's water infrastructure by ensuring adequate sanitation and treatment for the water our communities depend on.

These funds are needed now more than ever. Just ask the people of Martin County, Kentucky; Salem, Oregon; Toledo, Ohio; and Flint, Michigan — who had to stop using their contaminated tap water.

They are not alone: More than 27 million Americans are served by community water systems that do not fully meet health-based drinking water standards. Every year our nation suffers a quarter of a million water main breaks, with sewer overflows that discharge billions of gallons of raw sewage into local surface waters. At the same time, some $660 billion will be needed to repair the country's aging water infrastructure over the next 20 years.

The good news is that cities and states are fighting back. Earlier this year, the House passed a budget that rejected all of the proposed cuts, and the Senate seems likely to follow suit. States are already preparing to challenge the regulatory cutbacks in court. As for water quality certification, the strong language of the Clean Water Act recognizing state authority likely means that any new EPA steps to undercut that authority will be rejected by the courts.

For Trump's EPA, "cooperative federalism" means that states cooperate while the federal government kneecaps state-level efforts to protect people and the environment. And this is from an administration that ostensibly supports states' rights. It's chilling to wonder how far EPA might go if it wanted to weaken the role of the states. Let's hope we never find out.